

**BEFORE THE  
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION**

**In the Matter of:**

**PRIDE AIR EXPRESS, INC.,**

**Respondent.**

**Docket No. FMCSA-2010-0251<sup>1</sup>  
(Western Service Center)**

**ORDER DENYING PETITION FOR RECONSIDERATION**

**1. Background**

On May 18, 2010, the Field Administrator for the Western Service Center of the Federal Motor Carrier Safety Administration (FMCSA) (Claimant) served a Notice of Claim (NOC) on Pride Air Express, Inc. (Respondent).<sup>2</sup> The NOC, based on a March 26, 2010 compliance review, charged Respondent with four violations of 49 CFR 382.305(b)(2), failing to conduct random controlled substances testing at the applicable annual rate, with a proposed civil penalty of \$5,600 (\$1,400 per count).

After Respondent failed to respond to the NOC, Claimant served a Notice of Default and Final Agency Order (NDFAO) on June 23, 2010.<sup>3</sup> The NDFAO advised Respondent that the NOC would become the Final Agency Order in this proceeding effective June 28, 2010, with the civil penalty immediately due and payable on that date.

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<sup>1</sup> The prior case number was CA-2010-0035-US1213.

<sup>2</sup> See Exhibit 1 to Field Administrator's Answer and Opposition to Petition for Reconsideration Pursuant to 49 CFR 386.64 and Memorandum of Law in Support (Claimant's Answer to Petition).

<sup>3</sup> See Exhibit 3 to Claimant's Answer to Petition.

On June 28, 2010, Respondent served on Claimant a letter requesting “an abatement or drastic reduction” in the civil penalty. Respondent admitted the violations and alleged it had taken necessary corrective action.<sup>4</sup> Although the letter did not expressly mention the NDFAO, Claimant has apparently treated the document as a petition for reconsideration because it was submitted after the NDFAO was issued.

In his Answer to the Petition for Reconsideration served July 22, 2010, Claimant requested that the petition be denied because Respondent defaulted by failing to timely reply to the NOC and did not set forth any basis for reconsideration of the Final Agency Order.

## ***2. Decision***

Because Respondent did not reply to the NOC within 30 days of service of the NOC, as required by 49 CFR 386.14(a), it defaulted.<sup>5</sup> Under 49 CFR 386.64(b), a Notice of Default and Final Agency Order issued by a Field Administrator based on failure to timely reply to the NOC may be vacated if Respondent can demonstrate, in a timely filed Petition for Reconsideration, excusable neglect, a meritorious defense, or due diligence in seeking relief.

Respondent failed to meet its burden of demonstrating that the Final Agency Order should be vacated. Claimant established that the NOC was delivered to Respondent on May 20, 2010.<sup>6</sup> Because Respondent provided no explanation for failing to timely respond to the NOC, it has not demonstrated excusable neglect. Moreover, because Respondent admitted the alleged violations, it had no meritorious defenses. Although Respondent presented potential mitigating

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<sup>4</sup> See Exhibit 5 to Claimant’s Answer to Petition.

<sup>5</sup> The NOC reply deadline was June 22, 2010. This date was calculated by adding 30 days to the May 18, 2010 service date of the NOC and an additional five days because the NOC was served by mail. See 49 CFR 386.8(c)(3).

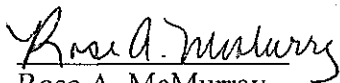
<sup>6</sup> See Exhibit 2 to Claimant’s Answer to Petition.

factors and requested a reduction in the civil penalty, the term “meritorious defense” in § 386.64 does not apply to requests to reduce a civil penalty where the Respondent does not contest the substantive violations set forth in the NOC.<sup>7</sup>

Section 386.64(b) authorizes—but does not require—the Assistant Administrator to vacate the Final Agency Order if Respondent acts with due diligence in seeking relief. Although Respondent served its petition within a week after receiving the NDFAO, the fact remains that it did not respond to the Agency until after receiving the NDFAO, failed to provide any explanation for not timely responding to the NOC and did not have a meritorious defense. Under these circumstances, it has not shown good cause for vacating the Final Agency Order.

The Petition for Reconsideration is denied. The Notice of Claim is the Final Agency Order in this proceeding. The civil penalty of \$5,600 is due and payable immediately. Payment may be made electronically through FMCSA’s registration site at <http://safer.fmcsa.dot.gov> by selecting “Online Fine Payment” under the “FMCSA Services” category. In the alternative, payment by cashier’s check, certified check, or money order may be remitted to the Claimant at the address shown in the Certificate of Service.

*It Is So Ordered.*



Rose A. McMurray  
Assistant Administrator  
Federal Motor Carrier Safety Administration

8-6-10

Date

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<sup>7</sup> See *In the Matter of Curtis R. Lunney dba L & F Transport*, Docket No. FMCSA-2007-28487, Order Denying Petition for Reconsideration, May 5, 2009, at 3.

**CERTIFICATE OF SERVICE**

This is to certify that on this 10 day of August, 2009, the undersigned mailed or delivered, as specified, the designated number of copies of the foregoing document to the persons listed below.

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